STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 94B006

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

CHARLES A. PACHECO

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,
UNIVERSITY OF COLORADO AT BOULDER,
DEPARTMENT OF HOUSING,

Respondent.

Hearing was held on January 4, and March 20, 1995, in Denver before Margot W. Jones, administrative law judge. Respondent appeared at hearing through Elvira Strehle-Henson, assistant attorney general. Complainant appeared at the hearing pro se.

Respondent called the following witnesses to testify at hearing: Richard Adair; Tim DeLaria; Debra Anderson; Mary Keenan; Dan Daniels; Dan Gallegos; and Tom Carson. Complainant testified in his own behalf and called the following individuals to testify at hearing: Mary Doreen DeLisle; Patricia DeLisle; Mary Keenan; Leonard Conradson; and Debra Anderson.

Respondent's exhibits 4 through 8 and 15 were admitted into evidence over objection. The parties stipulated to the admission of Complainant's exhibit A. Complainant's exhibits M through P were admitted into evidence without objection. Complainant's exhibits FF and FN were admitted into evidence over objection.

MATTER APPEALED

Complainant appeals the termination of his employment. Complainant alleges sex and race discrimination in the decision to terminate his employment.

ISSUES

1. Whether Complainant did the acts for which discipline was imposed.

2. Whether Complainant engaged in wilful misconduct.

3. Whether the decision to terminate his employment was arbitrary, capricious or contrary to rule or law.

4. Whether the decision to terminate Complainant's employment was based on race or sex discrimination.

PRELIMINARY MATTERS

1. Respondent's request to sequester the witnesses from the hearing room was granted.

2. Complainant's request to exclude Respondent's advisory witness, Tom Carson, from the hearing room was denied.

3. Complainant moved to strike evidence pertaining to the criminal investigation of his conduct. Complainant argued that it was the appointing authority's position that he did not use the information collected during the criminal investigation in order to reach the conclusion that Complainant engaged in wilful misconduct. Complainant maintained that witnesses and exhibits pertaining to the criminal investigation should be stricken because it is irrelevant.

Respondent opposed the motion to strike. Respondent argued that Complainant was entitled to a hearing in this matter only because the Colorado Civil Rights Division (CCRD) investigated his claim of discrimination and made a "probable cause" finding. Respondent maintained that CCRD relied on the information gathered during the criminal investigation into this matter. Respondent further maintained that, contrary to Complainant's assertion, the appointing authority relied on the information gathered during the criminal investigation.

Complainant's motion to strike was denied. Objections to the admissibility of evidence were ruled on at the time the evidence was offered at hearing.

Respondent's contention that Complainant's right to a hearing was based on the CCRD determination of "probable cause" was incorrect. Complainant was a state certified employee at the time of his termination and had the right to appeal the termination of his employment. Colo. Const., Article XII, Sect. 13(8).

4. On March 20, 1995, Complainant was permitted to tape record the hearing. The official record of the hearing for purposes of an appeal are the tape recordings maintained by the Board.

5. On March 8, 1995, Complainant filed an amended prehearing statement. On March 15, 1995, Respondent filed an objection to the prehearing statement. Respondent argued that the amendment was not timely filed and therefore should be stricken.

At hearing on March 20, 1995, the parties arguments were heard

with regard to Respondent's objection to the amended prehearing statement. Complainant was permitted to call the witnesses listed in the March 8, 1995, amended prehearing statement, paragraphs A through H. Complainant was permitted to call as rebuttal witnesses at hearing those individuals listed in the amended prehearing statement, paragraphs I through R. Respondent's motion to strike exhibit F, subsection q and r, was granted.

6. Debra Anderson appeared at hearing on January 4, 1995, and was represented by Earle Moyer, attorney at law. Anderson testified in Respondent's case in chief. On March 20, 1995, Complainant recalled Anderson to testify at hearing in his case. Anderson did not appear at hearing on March 20, 1995. John R. Vermessic, attorney at law and Moyer's associate, appeared at hearing. Vermessic represented that Moyer was on vacation and could not appear at hearing until the following day, March 21, 1995. Vermessic further stated that Anderson might not be physically able to appear at hearing. Anderson was on disability leave from her employment with the University.

Complainant made an offer of proof concerning the testimony he hoped to elicit from Anderson. Based on Complainant's offer of proof, it was determined that the evidence Complainant intended to offer by recalling Anderson would be repetitive. Therefore, Complainant was ordered to proceed with the presentation of his case without Anderson's testimony.

FINDINGS OF FACT

1. Complainant Charles Pacheco was employed by the University of Colorado, Housing Department (the University), for nine years. He was a storekeeper. Pacheco was not corrected or disciplined during his employment with the University. Pacheco is a 40 year old, Hispanic male.

2. John Deitz is a maintenance supervisor at the University. Deitz supervises Debra Anderson who is a housekeeper. Tom Carson was Pacheco's second level supervisor and the deputy director of housing at the time relevant to this appeal. The appointing authority for Pacheco's position was Dan Daniels, the director of housing in July, 1993, when Pacheco's employment was terminated effective August 8, 1993. Daniels subsequently retired from employment with the University and Carson was appointed to the position of director of housing.

3. Pacheco worked at the University with Debra Anderson, Anderson's spouse, and numerous other employees. Anderson is a 32 year old female. In 1992 and 1993, Anderson's young daughter was in need of special attention due to her medical condition. Anderson was permitted to bring her daughter to work at 3:30 p.m. Anderson's husband took the child home from work at 4:00 p.m.

when his work shift ended.

4. Anderson was sexually molested by her stepfather during her formative years. Anderson remains angry that nothing was done about her stepfather's actions. She claimed during her testimony at hearing that she decided to come forward and report the incident which gives rise to this appeal because she was angry that her stepfather got away with molesting her. Anderson does not like sex. However, she was known by her co-workers to speak openly and graphically about her sexual relationship with her husband.

5. Prior to Anderson's employment, she was placed on probation following conviction of charges related to the robbery and murder of a taxicab driver. Anderson gained her employment with the University as a housekeeper through a government job training program. During Anderson's employment with the University, she was not corrected or disciplined.

6. Prior to November, 1992, Pacheco and Anderson had an ongoing sexual relationship. They had sexual intercourse on the job.

7. Pacheco generally worked from 7:30 a.m. to 4 p.m. Debra Anderson worked from 3:30 p.m. to midnight.

8. On February 9, 1993, Anderson learned that Pacheco might be assigned to work the evening shift with her. Anderson told a co-worker, Richard Adair, that she did not want to work with Pacheco because he made unwanted sexual advances toward her. Adair reported these allegations to John Deitz. Deitz reported the allegations to Tom Carson.

9. On February 9, 1993, Carson spoke with Anderson about her allegations. Anderson reported to Carson that she did not want Pacheco transferred to the evening shift because of his unwanted sexual advances.

10. Anderson cannot read or write. Therefore, at Carson's direction, Adair prepared a written statement for Anderson recounting the incidents during which Pacheco was alleged to have made unwanted sexual advances. Two of the incidents are alleged to have occurred during working hours on the job. Anderson alleged in her statement that on one occasion she did inventory with Pacheco. On this occasion, in or around October, 1992, she alleges that Pacheco placed his hand on her thigh and rubbed it. Anderson claimed that she tried to remove his hand, but he put it back on her thigh.

11. On another occasion, in approximately November or December, 1992, Anderson alleged that she was preparing dinner at work for

herself and Pacheco. She claimed that she went to another part of the workplace to locate Pacheco to advise him that their dinner was ready. It is alleged that Pacheco threw Anderson over his shoulder and took her to a storage area. In this area, Anderson alleges that Pacheco forcibly held Anderson's hands behind her back, pulled down her pant and rubbed his penis on her stomach.

12. Anderson's statement, prepared by Adair, was turned over to Carson. Carson reported the incidents of alleged unwanted sexual contact to Dan Daniels. On February 10, 1993, Pacheco met with Daniels to discuss Anderson's allegations. Pacheco told Daniels that he could not deny that the incidents occurred, however, he maintained that he did not hold Anderson against her will. Pacheco told Daniels that he and Anderson had an on going sexual relationship and his contacts with her in the workplace were not unwanted, but were consensual.

13. On February 10, 1993, Daniels decided to place Pacheco on paid administrative suspension. Pacheco remained on paid administrative suspension until August 9, 1993, when his employment was terminated.

14. In or around February 9, 1993, Anderson was encouraged by Carson to report her allegations of unwanted sexual contact to the University police department. She did so and an investigation was conducted by the police department. The case was referred to the Boulder district attorney's office.

15. Daniels was regularly advised of the information collected during the investigation. The information and witness statements were collected, on February 10, 1993, by Tim DeLaria, a detective with the University police department. DeLaria recorded interviews with Pacheco, Anderson, Philip Anderson, Tom Carson, Richard Adair, Walter Galush and Dan Gallegos. The witness interviews were transcribed on February 12, 1993.

16. Sixty days later, on April 6, 1993, Daniels met with Pacheco for a R8-3-3 meeting. Daniels did not consider whether Pacheco was charged criminally in making the decision to consider disciplinary action. Daniels did not consider the question whether Pacheco's contacts with Anderson were consensual in making the decision to consider disciplinary action. Daniels was not awaiting the outcome of the criminal charges before considering disciplinary action or taking disciplinary action.

17. Daniels thought that the allegations that Pacheco was engaging in sexual activity on the job during working hours was outrageous, justifying the investigation and consideration of discipline.

18. At the R8-3-3 meeting on April 6, Pacheco reiterated the

information he provided Daniels on February 10, 1993. Pacheco admitted that he had a consensual sexual relationship with Anderson for some time prior to October, 1992 through December, 1992. Pacheco admitted that he had sexual contact with Anderson on the job during working hours.

19. Ninety days later, on July 8, 1995, Daniels gave Pacheco notice that his employment was terminated, effective August 9, 1993. The notice of termination states, in pertinent part:

. . .

> The State Personnel Rules provide that employees be given formal notice when a disciplinary action is taken against them. (R8-3-3(d)(4)). This letter is to notify you that I have decided to take such an action and that your employment will be terminated as of the close of business on August 9, 1993. Your current status, i.e. administrative leave with pay, will continue through that date.

. . .

> The specific charges concern serious and wilful misconduct. This conduct involved your acknowledged sexual behavior, i.e. that you had physical sexual contact i.e., "had sex" with a co worker, Ms. Debbie Anderson, on more than one occasion during the past year, in the work place, and while one or both of you were at work.

> The Personnel Rules provide that disciplinary action can be taken against an employee for wilful misconduct (see Section 8-3-3-C of the State of Colorado Personnel System Rules and Regulations). I feel that the behavior described above constitutes clear, wilful and serious misconduct. Its seriousness is exacerbated by the fact that Ms. Anderson's husband is a co worker in the same department within housing, i.e. maintenance, in which you work.

> In our meetings you acknowledged the behavior which I have described as the basis for this action, but insisted that the relationship you had with Ms. Anderson was consensual. This question notwithstanding, the behavior was unacceptable.

. . .

20. On March 1, 1993, Pacheco was arrested and charged with criminal attempt, sexual assault in the third degree, second degree harassment. On August 2, 1993, the charges were dismissed

when it was discovered by the assistant district attorney assigned to the case that during the relevant period, Anderson was having a sexual relationship with another co-worker on the job. The assistant district attorney represented to a Boulder District Court Judge, on August 2, 1993, that in light of the evidence she had discovered, she no longer had a good faith belief that she could prove that Pacheco committed the acts with which he was charged.

21. On July 17, 1993, Pacheco appealed the termination of his employment to the Board. The appeal alleged that Pacheco's termination was discriminatory on the basis of sex and race. On July 29, 1993, Pacheco's case was referred to CCRD for investigation of his claims of sex and race discrimination. On September 29, 1994, the director of CCRD found that there was probable cause to believe that sex discrimination occurred.

DISCUSSION

A certified employee may be disciplined only for just cause as specified in Article XII, Section 13(8) of the Colorado Constitution. Colorado Association of Public Employees v. Department of Highways, et. al, 809 P.2d 988 (Colo. 1991). The burden of proving by a preponderance of the evidence that just cause exists for the discipline imposed rests with the appointing authority. Section 24-4-105(7), C.R.S. (1988 Repl. Vol. 10A). The Board may reverse or modify the action of the appointing authority only if such action is found to have been taken arbitrarily, capriciously, or in violation of rule or law. Section 24-50- 103(6), C.R.S. (1988 Repl. Vol. 10B).

Capricious or arbitrary exercise of discretion by the appointing authority can arise in only three ways, namely: (a) by neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; (b) by failing to give candid and honest consideration of the evidence before it, on which it is authorized to act in exercising its discretion; (c) by exercising its discretion in such a manner after a consideration of evidence before it, as clearly to indicate that its action is based on conclusions from the evidence, such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. Van de Vegt v. Board of Commissioners of Larimer County, 55 P.2d 703, 705 (Colo. 1936).

Job performance standards are broadly defined in section 24-50-116, C.R.S. (1988 Repl. Vol. 10B), which provides:

> **Standards of performance and conduct**. Each employee shall perform his duties and conduct himself in accordance with generally accepted standards and with specific standards prescribed by law, rule of

the board, or appointing authority.

The Board rules give direction with regard to the imposition of discipline. R8-3-1(B) and (C) provide:

(B) The decision to correct or discipline an employee shall be governed by the nature, extent, seriousness and effect of the act, error or omission committed; the type and frequency of previous undesirable behavior; the period of time that has elapsed since a prior offensive act; the previous performance evaluation of the employee; an assessment of information obtained from the employee; any mitigating circumstances; and the necessity of impartiality in relations with employees.

(C) In the case of a certified employee, unless the conduct is so flagrant or serious that immediate disciplinary action is appropriate, corrective action shall be imposed before resorting to disciplinary action.

Respondent established by a preponderance of the evidence that Complainant engaged in the conduct for which discipline was imposed. Complainant had sexual contact with a co-worker on the job during working hours. This constitutes wilful misconduct, since generally accepted standards of conduct in the workplace dictate that an employee should not engage in nor be compensated for engaging in sexual activity with a co-worker on the job.

The appointing authority testified that he was not concerned with the question whether Complainant's relationship with Anderson was consensual. The appointing authority in the letter of termination, and in his testimony, stated that he was concerned with Complainant's sexual activities on the job and the fact that these activities occurred with a co-worker's wife.

In light of the totality of the evidence presented at hearing, the decision to terminate Complainant's employment cannot be sustained. Complainant had an otherwise exemplary employment record with the University. Complainant admitted to the acts of misconduct to the appointing authority on February 10, 1993. On February 10, the appointing authority placed Complainant on paid administrative leave and left him on paid leave until August 9, 1993.

The appointing authority had the information and statements of witnesses collected by DeLaria, the University detective, on or about February 12, 1993. Yet, six months elapsed before Complainant's employment was terminated. These actions are inexplicable and, in fact, the appointing authority offered no plausible explanation.

The administrative law judge is not persuaded that the

Complainant's violations rise to the level of seriousness which the Respondent professes. It certainly cannot be concluded that the appointing authority believed that Complainant's conduct was flagrant or serious. It cannot be concluded that there were grounds for termination of Complainant's employment.

Complainant argues that the decision to terminate his employment was based on race discrimination. However, there was no evidence of race discrimination. Complainant further argues that he was subject to sex discrimination because Anderson was treated more leniently for the same conduct that Complainant's employment was terminated.

Policy 11-1, 4 Code Colo. Reg. 801-1, provides:

> Discrimination Prohibited. Discrimination for or against any person is prohibited, except for bona fide occupational reasons, in recruitment, examination, hiring, classification and compensation, training, promotion, retention, assignment of duties, granting of rights and benefits, or any other personnel action because of race, creed, color, sex (including sexual harassment), sexual orientation, national origin or ancestry, ...

Complainant bears the burden of proof to establish a prima facie case of discrimination. A prima facie case of sex discrimination is established through the following facts: 1) that the employee is a male; 2) that the employee engaged in the misconduct and was disciplined for that conduct; 3) that the employer was aware of female employee who engaged in similar acts of misconduct; and 4) the employer took no disciplinary action against this employee. See, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

If Complainant makes a prima facie case showing discrimination by establishing the requisite facts, the employer must then rebut the presumption of discrimination by presenting evidence of a legitimate non-discriminatory business reason for the allegedly discriminatory practice. 411 U.S. at 802. If the employer does so, the burden shifts back to Complainant to establish by a preponderance of the evidence, that the employer's asserted business reason for it's action is a mere pretext for unlawful discrimination. Id.

Complainant established a prima facie case of discrimination by showing that he is male, that he admitted to having sex on the job during working hours with a female co-worker, and that Respondent terminated his position while taking no action against the female employee who engaged in the same conduct.

Respondent failed to satisfy its burden to state a legitimate business reason for terminating Complainant's employment, while not disciplining Anderson. While the appointing authority claimed

to be thoroughly investigating the allegations of sexual misconduct, he testified that he was unconcerned with the question whether Complainant and Anderson's relationship was consensual. Based on the facts established at hearing, an appointing authority could not conduct a thorough investigation without determining whether Complainant and Anderson's relationship was consensual. That question was essential to maintaining "impartiality in relations with employees" referenced above in R8-3-1-(B).

At hearing, Complainant testified that the relationship was consensual, while Anderson testified that it was not. Where there is conflicting testimony, the credibility of witnesses and the weight to be given their testimony is within the province of the administrative law judge. Charnes v. Lobato, 743 P.2d 27 (Colo. 1987). This case turns on the credibility of the parties' witnesses with regard to whether the relationship between Complainant and Anderson was consensual. While this is not a basis of the termination decision, it is relevant to the issue whether there was a basis to treat Anderson differently from Complainant.

Colorado Jury Instruction 3:16: offers guidance to the trier of fact with regard to credibility determinations.

> You are the sole judges of the credibility of the witnesses and the weight to be given their testimony. You should take into consideration their means of knowledge, strength of memory and opportunities for observation; the reasonableness or unreasonableness of their testimony; their motives; whether their testimony has been contradicted; their bias, prejudice or interest, if any; their manner or demeanor upon the witness stand; and all other facts and circumstances shown by the evidence which affect the credibility of the witnesses. If you believe that any witness has wilfully testified falsely to any material fact in this case, you may disregard all or any part of the witness' testimony.

Applying these factors to each witness, the conclusion is drawn that Anderson was not credible. For that reason, her testimony is substantially disregarded. Complainant's testimony was deemed to be more credible and was given substantial weight. Thus, relying on Complainant's testimony that his relationship with Anderson was consensual, it must be found that he was subjected to different treatment on the basis of his sex.

Rule R8-3-4(A)(1) provides: "If the board or hearing officer reverses a dismissal, but finds valid justification for the imposition of a disciplinary action, a suspension may be substituted for a period of time up to the time of the decision." The period of the suspension should not exceed 135 days. Rose v. Department of Institutions, 826 P.2d 379 (Colo. App. 1991). Given the combined conduct of Complainant and Respondent, this rule provides the appropriate remedy.

Section 24-50-125.5, C.R.S. (1988 Repl. Vol. 10B) provides for the recovery of attorney's fees and costs upon a finding that the personnel action from which the proceedings arose, or the appeal of such action, was instituted frivolously, in bad faith, maliciously, or as a means of harassment, or was otherwise groundless. Under the circumstances of this case, an award of attorney's fees is not warranted.

CONCLUSIONS OF LAW

1. Respondent proved that Complainant committed the acts for which discipline was imposed.

2. The decision to administer disciplinary action terminating Complainant's employment was arbitrary, capricious or contrary to rule or law.

3. Respondent is found to have discriminated against Complainant

on the basis of his sex.

4. Neither party is entitled to an award of attorney's fees.

ORDER

The action of the appointing authority is rescinded; a disciplinary suspension is substituted effective August 9, 1993, for a period not to exceed 135 days. The Complainant shall be reinstated with full back pay and benefits, except for the period of suspension and less any income Complainant earned which he would not have earned if his employment had not been terminated by Respondent.

DATED this _____ day of May, 1995, at Denver, CO

_____
Margot W. Jones
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on this _____ day of May, 1995, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Charles A. Pacheco
2140 33rd Street #B
Los Alamos, NM 87544-2008

and in the interagency mail, addressed as follows:

Elvira Strehle-Henson
Assistant University Counsel
University of Colorado
Regent 203, Campus Box 13
Boulder, CO 80309

_____

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1.To abide by the decision of the Administrative Law Judge ("ALJ").

2.To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties and advance the cost therefor. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ - APPELLANT - must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is $50.00. The estimated cost to prepare the record on appeal in this case with a transcript is $1242.00. Payment of the estimated cost for the type of record requested on appeal must accompany the notice of appeal. If payment is not received at the time the notice of appeal is filed then no record will be issued. Payment may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. If the actual cost of preparing the record on appeal is more than the estimated cost paid by the appealing party, then the additional cost must be paid by the appealing party prior to the date the record on appeal is to be issued by the Board. If the actual cost of preparing the record on appeal is less than the estimated cost paid by the appealing party, then the difference will be refunded.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R10-10-5, 4 Code of Colo. Reg. 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 Code of Colo. Reg. 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 Code of Colo. Reg. 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.